

## Crimes Against the Person

Dissemination of Harmful

Material, and Open & Gross

### **Commonwealth v. Militello**

Appeals Court, May 24, 2006

*Where furnishing alcohol to a minor is a specific intent crime, upon request, a defendant is entitled to an instruction that his intoxication may have affected his ability to form such an intent.*

*On element of open and gross lewdness is that the defendant's act of exposure must in fact "alarm or shock" one or more witnesses to the exposure.*

*To prove dissemination of matter harmful to minors, the matter must either be "obscene," or the material "(1) describes or represents nudity, sexual conduct or sexual excitement, so as to appeal predominantly to the prurient interest of minors; (2) is patently contrary to prevailing standards of adults in the county where the offense was committed as to suitable material for such minors; and (3) lacks serious literary, artistic, political or scientific value for minors."*

The defendant accompanied 4 boys, ranging from age 9 to 13, for a camp-out near his house. The defendant was present to supervise the maintenance of a campfire. After consuming several beers, he shed his supervisory purpose - and soon his clothes - to carry out his suggestion that the group go skinny dipping. The boys went swimming, but remained properly attired. The defendant's nudity and creepiness made the boys uncomfortable and disgusted, and the group soon returned to the campfire. Back at the campfire, the defendant shared his beer and a Playboy magazine with the boys. The next morning, one of the boys revealed to his mother what had occurred. The defendant was later convicted of contributing to the delinquency of a child, open and gross lewdness, disseminating matter harmful to minors, and furnishing alcoholic beverages to persons under 21.

The Appeals Court determined that the evidence was insufficient to support the dissemination charge where the boys' testimony (the Playboy was not entered into evidence) failed to show that the magazine (as a whole) was either obscene or that it depicted sexual conduct which would appeal to a minor's prurient interest. Although the defendant's open display of his genitalia was sufficient to register disgust among the boys, it was insufficient to cause them "alarm or shock," and was thus, insufficient to prove the open and gross lewdness charge.

The Appeals Court also held that furnishing alcohol to a minor is a specific intent crime, and that because intoxication may affect one's ability to form such an intent, the judge erred in refusing to give a *Henson* instruction. Contributing to the delinquency of a minor, on the other hand, does not require a specific intent. Rather, the defendant must only understand that his conduct was "blameworthy in relation to the minor," but only to make clear that the crime is not one of strict liability.